

The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

COLUMBIA RIVERKEEPER, et al.,

Plaintiffs,

v.

ANDREW WHEELER, et al.,¹

Defendants.

No. 2:17-cv-00289-RSM

**UNITED STATES' MOTION
TO EXTEND BY 30 DAYS THE
FIRST COMPLIANCE DATE IN
THE COURT'S ORDER**

NOTE ON MOTION CALENDAR:
November 2, 2018

Defendants Andrew R. Wheeler, Acting Administrator, and the United States Environmental Protection Agency (collectively, "EPA"), respectfully request that the Court modify the relief set out in its Order Re: Motions for Summary Judgment, ECF No. 39 (Oct. 17, 2018), to extend by 30 days the date by which EPA must "approve or disapprove the constructively submitted [Total Maximum Daily Load ("TMDL")] at issue in this case" *Id.* at 16. The Order requires that EPA take such action within 30 days of the Court's Order, *id.*, that is, by November 16, 2018. If this extension request is granted, the date for EPA to take action would be December 17, 2018.²

¹ Acting EPA Administrator Andrew R. Wheeler is automatically substituted for his predecessor in office pursuant to Fed. R. Civ. P. 25(d).

² Because a 30-day extension would fall on Sunday, December 16, 2018, the due date would extend to Monday, December 17, 2018.

1 Counsel for Plaintiffs has informed the United States that Plaintiffs will oppose the relief
2 requested in this Motion.

3 The grounds for this Motion are as follows:

4 1. The Court's recent decision granted in part Plaintiffs' motion for summary
5 judgment. The Court concluded that "Washington and Oregon have clearly and unambiguously
6 indicated that they will not produce a TMDL for [the Columbia and lower Snake Rivers]," and
7 so "a constructive submission of 'no TMDL' has occurred" – which, this Court ruled, triggers
8 EPA's obligation to approve or disapprove the submission. *Id.* at 14-15. Clean Water Act
9 section 303(d)(2), 33 U.S.C. § 1313(d)(2), requires EPA to approve or disapprove TMDL
10 submissions within 30 days and, if EPA disapproves, to issue a TMDL in the state's place 30
11 days thereafter. Based on this provision, the Court's Order provided that "EPA thus has 30 days
12 from the date of this Order to approve or disapprove the constructively submitted TMDL
13 [addressing temperature impairments in the Columbia and Snake Rivers], and, if disapproved, 30
14 days after the disapproval to issue a new TMDL." *Id.* at 15.

15 2. The United States requests that the Court modify the remedy portion of its Order
16 by extending the first of the two deadlines – governing EPA's approval or disapproval of the
17 referenced constructive submission – by 30 days, until December 17, 2018.

18 3. The United States requires this additional time to complete its internal processes
19 for assessing whether or not it will appeal the Court's decision. That process requires that EPA
20 consult with the Department of Justice, and in particular with the Office of Solicitor General, to
21 determine whether to pursue an appeal – a process that routinely takes more than 45 days. Such
22 a decision typically involves high-level decision-makers, and is likely, in this case, to include
23 such individuals who have joined the Department of Justice or EPA only recently or after the
24 government filed its primary merits brief, and who will need to be briefed on the specifics of this

1 matter for the first time.³ Granting the requested extension of the Court's first deadline will
 2 allow the United States the time needed to coordinate between officials at both agencies; to
 3 consider the relevant legal and practical issues raised by the Court's decision; and to brief the
 4 relevant officials on both the decision and the underlying details of the case, as well as its
 5 implication for other litigation and any possible avenues for settlement. Perhaps most
 6 pressing, granting the requested extension would allow the United States – if the relevant high-
 7 level officials deem it necessary and appropriate – to fully preserve its appeal rights by filing a
 8 motion to stay the remedy Order before EPA's first deadline to take action.

9 4. In addition to the United States' need for sufficient time to comply with these
 10 internal processes, EPA requires this brief extension to assess the appropriate means of
 11 complying with Clean Water Act section 303(d)(2), in light of the Court's Order, in this first-of-
 12 a-kind circumstance. EPA anticipates that this process may include coordination with the parties
 13 to the 2000 Memorandum of Agreement, *see* U.S. Cross-Motion for Summary Judgment, ECF
 14 No. 31 at 11, as well as internal deliberation about the proper form and content of this novel type
 15 of approval or disapproval action.

16 5. Finally, should EPA and Department of Justice officials so decide, the requested
 17 extension would also allow the United States to open discussions with Plaintiffs regarding the
 18 schedule for completion of the TMDL (the Order's second deadline), should the parties wish to

19 ³ For example, Jeffrey Bossert Clark, the Assistant Attorney General for the Environment and
 20 Natural Resources Division of the U.S. Department of Justice – which has responsibility for both
 21 the district court and appellate court litigation of this matter – was confirmed by the U.S. Senate
 22 on October 11, 2018, and is expected to assume his duties on or about November 1. David Ross,
 23 EPA's Assistant Administrator for Water, assumed office on January 22, 2018, and Matthew Z.
 24 Leopold, EPA's General Counsel, assumed office on January 8, 2018 – both after the United
 States filed its Cross-Motion for Summary Judgment in this matter. EPA's Acting
 Administrator, Andrew Wheeler, was confirmed as Deputy Administrator in April 2018 and has
 served as Acting Administrator since July 9, 2018 – after the close of briefing in this case in
 January 2018.

1 discuss adjustments to the 30-day statutory timeframe before that deadline comes due. *See*
 2 Order, ECF No. 39 at 15-16.

3 6. The Court possesses broad authority to modify a prior order. *See* Fed. R. Civ. P.
 4 60(b). Courts also possess broad authority to consider the needs of an agency when fashioning
 5 an appropriate remedy, or when modifying a prior remedial order, in response to a
 6 nondiscretionary citizen suit claim in order to provide a longer period of time for agency action
 7 than set out in the relevant statute. *See, e.g., Natural Res. Def. Council, Inc. v. Train*, 510 F.2d
 8 692, 712-13 (D.C. Cir. 1974).

9 WHEREFORE, the United States respectfully requests that the Court modify its remedial
 10 Order by extending by 30 days, until December 17, 2018, the date by which EPA must take
 11 action to approve or disapprove the constructive submission referenced in the Court's decision.

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 13 DATED: October 25, 2018

Respectfully submitted,

14 JEFFREY H. WOOD
 Acting Assistant Attorney General
 Environment & Natural Resources Division
 U.S. Department of Justice

16 /s/ Chloe H. Kolman
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U.S. Motion to Extend
First Compliance Date
(No. 2:17-cv-00289-RSM) - 5

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2018, I filed the foregoing United States' Motion to Extend by 30 Days the First Compliance Date in the Court's Order with the Clerk of the Court using the CM/ECF system which will cause a copy to be served upon counsel of record.

/s/ Chloe H. Kolman